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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re R.O. et al., Persons Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. R.O. et al., Defendants and Appellants.	A134712 (Alameda County Super. Ct. Nos. SJ1101742901 & SJ1001500302)
THE PEOPLE, Plaintiff and Respondent, v. M.L., Defendant and Appellant.	A136477 (Alameda County Super. Ct. No. SJ1001500302)

The juvenile court sustained allegations minors R.O. and M.L. willfully and maliciously discharged a firearm at an occupied vehicle, and that R.O., additionally, assaulted a passenger with a handgun and personally used a firearm in committing both counts. R.O. makes two contentions on appeal: that the juvenile court erred in not suppressing his statement to police on grounds it was involuntary, and that the court failed to consider less restrictive alternative placements for him than the Department of Juvenile Justice (DJJ). M.L. advances four contentions on appeal: there is insufficient

evidence he aided and abetted R.O., the court failed to declare the sustained offense a felony or misdemeanor, the gang emblem probation condition is unconstitutionally vague, and there is insufficient evidence to support the restitution award. As to M.L., we (a) remand for the limited purpose of the juvenile court declaring whether he has been convicted of a violation of Penal Code section 246[1] as a felony or misdemeanor and (b) order the gang condition modified. In all other respects, we affirm the juvenile court's findings and dispositional orders.

PROCEDURAL AND FACTUAL BACKGROUND

At about 5:00 p.m. on August 2, 2011, two minors, G.C. and M.B., were sitting in a van parked in front of an apartment complex on Catron Street. A group of children were playing in front of the van.

Three or four "kids" wearing black hoodies approached the van. G.C. testified they appeared to be 15 or 16 years old and were tall. Their faces were covered with hoods, and G.C. could not tell their gender or race. G.C. believed something bad was going to happen because their faces were covered. One youth was in the lead, with his hands in his pockets.

Two of the youths came very close to the van's rear window. One of them took out a gun and shot through the window, then ran. G.C. turned around and saw M.B. had been shot. G.C. first testified he did not see the direction in which the youths ran, but on cross-examination testified two ran in the direction of the creek, and a third ran in a different direction.

G.C. was affiliated with the Sureño gang. He testified gang members considered people who are "snitches" bad. He would never identify someone he saw commit a shooting. It would also be "snitching" to say whether or not the youths who approached the van were gang members. G.C. testified there was no knife, gun, or any other weapon in the van. He had not seen the youths earlier in the day, nor had any "issues with anyone" earlier that day.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

M.B. testified he was sitting in the van with G.C. and two others. He saw some individuals whom he had never seen before approach the van. When the group reached the van, he "got shot." The bullet was still in his arm. M.B. identified R.O. and M.L. in the courtroom as two of the individuals who approached the van, though he was reluctant to do so because he knew being called a snitch is "a bad thing." He could not identify the shooter, but testified it was neither M.L. nor R.O. He saw the gun and identified it as a semiautomatic "Caliber .22." After the shooting, the individuals "took off and ran to the river."

M.B. was not currently affiliated with the Sureño gang, but had been in 2008. He had not had any conflicts with anyone around the date of the incident. M.B. testified he had been unable to identify anyone when the police showed him photographs after the incident. He acknowledged, however, he wrote on one of the photos police showed him on " 'The one that shot,' " identifying an individual other than R.O.

A neighbor who lived on Catron with his partner was outside around 5:30 p.m. on August 2, and saw boys in a green van across from his building. He went inside his home near a window looking out on the street, and saw "three guys, walk right by next to the wall." His partner also saw them, and "said for us to be careful, because they looked like gangsters." Two of them were wearing black sweat shirts with the hood up, and one of them was wearing a cap backwards and a white shirt. The neighbor identified M.L. as the boy wearing the cap and R.O. as one of the boys wearing a black sweat shirt with the hood up. The neighbor went out and yelled at them, "but one of them still lifted up a gun and shot it" into the van. He identified the shooter as R.O. The boys "ran between" the children who were playing there and into the creek area. The neighbor called 911. About 30 minutes later, police took him in a patrol car to a location near 98th Avenue and asked if he could identify two people. The neighbor recognized both of them as two of the boys involved in the shooting, and identified them as R.O. and M.L.

Oakland Police Officer Jeffrey Smoak was dispatched to the shooting at about 6:30 p.m. Dispatch informed him three male Hispanic juveniles had fled "westbound in the creek below Catron." The shooting took place in an area known as a location for

gangs. Officer Smoak drove to the "dead-end of Bernhardt . . . another location that people can escape the creek on the street." On Bernhardt, he saw two male Hispanic juveniles who matched the description of the suspects. The boys were "sweating profusely," and began walking separately after the officer saw them. Officer Smoak detained them, and observed they had dirt on their hands and fresh rips in their pants. The boys, identified as M.L. and R.O., told the officer they had left the third person who had been with them, a boy wearing a black hoodie, at 105th Avenue.

Oakland Police Officer Eric Milina separately interviewed M.L. and R.O. Both interviews were videotaped and the DVDs admitted into evidence. R.O. initially denied any knowledge of the shooting, but later admitted he was the shooter. He told police he kept the gun at his mother's house. At trial, he testified his cousin Albert was the shooter. He admitted they planned to scare the boys, and knew a gun was going to be pointed at them. M.L. admitted being at the scene of the shooting, but stated he did not know anyone had a gun and did not know who fired the shot.

The Alameda County District Attorney filed a petition alleging both R.O. and M.L. assaulted M.B. with a handgun, (§ 245, subd. (b)) and willfully and maliciously discharged a firearm at an occupied motor vehicle. (§ 246.) The petition also alleged as to both counts that R.O. personally used a firearm. (§ 12022.5, subd. (a).)

As to R.O., the juvenile court found true both allegations and the firearm use enhancement, and committed him to the DJJ. As to M.L., the juvenile court found true the allegation of willful and malicious discharge of a firearm at an occupied vehicle and dismissed the count alleging assault with a handgun. The court committed M.L. to the custody of the probation officer to be placed in a suitable foster home or institution. Five months after M.L. filed his notice of appeal, the court held a restitution hearing and ordered M.L. to pay the victim's mother $11,385.96 in restitution, with R.O. jointly and severally liable. Only M.L. filed a notice of appeal from the restitution order. We ordered the two appeals consolidated.

DISCUSSION

Voluntariness of R.O.'s Confession

R.O. contends his admission to police that he was the shooter was involuntary because police promised leniency to M.L., his uncle, if he confessed.

" 'In reviewing the voluntary character of incriminating statements, " '[t]his court must examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden and proved that the statements were voluntarily given without previous inducement, intimidation or threat. [Citations.] With respect to the conflicting testimony, the court must "accept that version of events which is most favorable to the People, to the extent that it is supported by the record." ' [Citation.]" [Citation.] "In order to introduce a defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] . . . When, as here, the interview was tape-recorded, the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness." [Citation.]' [Citation.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 346 (*McWhorter*).)

" 'The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." [Citations.] " 'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.]" ' " (*McWhorter, supra*, 47 Cal.4th at p. 346–347.) "[T]hreats or promises relating to the defendant's relatives may also cause a defendant's will to be overborne. 'A threat by police to arrest or punish a close relative, or a promise to free the relative in exchange for a confession, may render an admission invalid.' [Citations.]" (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209.)

" ' "In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]

[Citation.]' [Citation.]" (*McWhorter, supra*, 47 Cal.4th at pp. 346–3347.) Characteristics of the accused which may be considered include age, sophistication, emotional state and prior experience with the criminal justice system. (*In re Shawn D., supra*, 20 Cal.App.4th at p. 209.) "[N]o single factor is dispositive in determining voluntariness, but rather courts consider the totality of circumstances." (*People v. Williams* (1997) 16 Cal.4th 635, 661.)

" 'A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citations.] A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." [Citation.] The statement and the inducement must be causally linked.' " (*McWhorter, supra*, 47 Cal.4th at pp. 346–347.)

We have reviewed the two DVDs containing the interviews of R.O. R.O. was advised of his *Miranda*[2] rights at the beginning of the interview and allowed to call his mother. The officers told him he was in a "messed up situation. Somebody says you shot a boy on Catron. Ok, you drag your uncle down here, you got the cops looking for your friend out here, and it's all behind you, man. So there comes a time when you got to suck it up and say alright man, this is the problem, this is what happened, you know, cut my uncle loose, he got nothing to do with it, you don't have to look for my friend. There's a reason why this happened . . . if you're honest and tell the truth, it works out a lot better."[3]

R.O. initially denied being the shooter or knowing anything about the incident. Police then told him it looked like R.O. was "taking [M.L.] down you." They also told R.O. they could not make him tell them what happened.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[3] The record contains a partial transcript of the interview included in the District Attorney's opposition to R.O.'s motion to exclude his statement to police.

After taking about an hour break, the officers returned and asked R.O. if he thought M.L. deserved to go to jail. They told R.O. he "messed up" and now it was "time to do the right thing," stating "[Y]ou'll let another guy go down too. That's weak." R.O. asked if they wanted him to say he did it, and an officer responded "I don't want you to say you did it, I want to actually know who did the shooting, I want to know the truth." R.O. then told the officers he was at the park when some guys pulled out a knife and chased him. He got mad, went and got a gun, and shot them, though he was only trying to scare them.

The DVDs of the interview reveal the officers never acted in an intimidating manner toward R.O., and treated him respectfully throughout the course of the interview. The officers never raised their voices, and R.O. appeared calm and coherent. Indeed, R.O. testified the police were nice to him. The officers repeatedly told him they just wanted him to tell the truth, and emphasized they did not just want R.O. to say he did it. The officers' comments about M.L. cannot be construed as promises of leniency. To the contrary, they indicated if R.O. did it, and M.L. did not R.O. should not "let another cat go down too." Upon our independent review, we conclude under the totality of the circumstances R.O.'s confession was voluntary. (See *People v. Boyette* (2002) 29 Cal.4th 381, 412.)

R.O.'s Commitment to the DJJ

R.O. also contends the court abused its discretion in committing him to the DJJ because it failed to consider less restrictive placement options.

"A juvenile court's commitment order may be reversed on appeal only upon a showing the court abused its discretion. [Citation.] ' "We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them." ' [Citation.]" (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329–1330.)

In making a placement determination, the court "shall consider, in addition to other relevant and material evidence, (1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor's previous delinquent

history." (Welf. & Inst. Code, § 725.5.) "Additionally, 'there must be evidence in the record demonstrating both a probable benefit to the minor . . . [of a DJJ] commitment and the inappropriateness or ineffectiveness of less restrictive alternatives.' [Citation.]" (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 485.) "No ward of the juvenile court shall be committed to the Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority."[4] (Welf. & Inst. Code, § 734.) While section 734 requires the court be 'fully satisfied' that Youth Authority commitment will be of probable benefit to the minor, "[t]hat section does not explicitly require an express finding of probable benefit." (*In re Jose R.* (1983) 148 Cal.App.3d 55, 58.) Neither is the juvenile court required to state "the specific reasons for [a DJJ] commitment . . . in the record." (*Id*. at p. 59.) Furthermore, "there is no absolute rule that a [DJJ] commitment should never be ordered unless less restrictive placements have been attempted." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 577 (*Teofilio A.*).)

The dispositional report recommended an out-of-home placement for R.O., "in a facility that can meet all of the minor's behavioral and educational needs." Rite of Passage Silver State Academy in Nevada found him suitable for that program. At the dispositional hearing, a probation officer other than the one who wrote the report attended and recommended a DJJ placement based on the seriousness of the offense. R.O.'s attorney maintained DJJ was not an appropriate placement given this was R.O.'s first offense and a number of his teachers had submitted letters of support. The prosecutor urged a DJJ placement was appropriate given the seriousness of the crime, the lack of mitigating factors, the fact the shooting was gang-related, and the risk to public safety.

[4] "The California Youth Authority was renamed, effective July 1, 2005, the Division of Juvenile Justice of the Department of Corrections and Rehabilitation (DJJ). (Gov. Code, §§ 12838, subd. (a), 12838.13.)" (*In re James H.* (2007) 154 Cal.App.4th 1078, 1081, fn. 2.)

The juvenile court indicated it had reviewed the disposition report. The court also stated it had reviewed the letter from "Mr. Paul Dudley, . . . Admissions Manager, Rites of Passage," which indicated he found R.O. suitable for their program. The court also reviewed "six additional letters . . . , as well as an award certificate [¶] . . . [and] four more typed letters on behalf of [R.O.] as well as a . . . handwritten letter, that appears to be from [R.O.]'s uncle." The court additionally noted it had presided over the jurisdictional hearing and heard all evidence presented. The court also observed: "One thing that hasn't been said yet on the record is this was not just a shooting from a distance at individuals in the van. This was a targeted shooting from a close distance, and this is akin to an assassination attempt. This is as extreme as the situation could be other than . . . the victim did not die from the gunshot." The court ultimately found "the Minor's mental and physical condition and qualifications are such to render it probable he will be benefitted by the reformatory educational discipline or other treatment provided by the Department of Juvenile Justice."

R.O. asserts there was "no evidence in the record 'to support the judge's implied determination that he *sub silentio* considered and rejected reasonable alternative dispositions' as ineffective or inappropriate," relying on *Teofilio A., supra*, 210 Cal.App.3d 571. In that case, the minor "had no criminal record; his conduct was not aggressive or assaultive; he was not armed; he threatened no one, and did not resist his arrest; his offense was a single $60 sale of cocaine." (*Id.* at p. 578.) "The only evidence before the court was from the probation officer's report, and therefore, we must presume the judge predicated his disposition upon this report. However, the report fails to show the probation officer considered less restrictive alternatives or why such alternatives would be ineffective or inappropriate. This leaves the record barren on this crucial issue." (*Id.* at p. 577.)

In contrast to the circumstances and record in *Teofilio A.*, the record in this case shows R.O. was armed, aggressive, and assaultive. His offense was violent, at close range, and committed with disregard for young children playing around the van who were not the target of his crime. Furthermore, the record makes clear the court was aware of

and reviewed the proposed less restrictive placement recommended in the disposition report and by R.O.'s counsel, as well as letters urging such placement. The juvenile court, however, placed greater weight on the circumstances and gravity of the offense, an appropriate factor to consider. (Welf. & Inst. Code, § 725.5; see *In re Asean D.* (1993) 14 Cal.App.4th 467, 473 [court committed the minor to the Youth Authority "despite the minor's good record," due to "the viciousness of the attack, during which the minor may have been armed and in which he certainly used great physical force on the victims, and his continuing refusal (despite his formal admission) to take responsibility for the crimes, clearly signaled that he constituted a serious danger to the public unless securely confined"].) Thus, the record was not "barren" as in *Teofilio A.*, *supra*, 210 Cal.App.3d at page 577, but evidenced a consideration and rejection of less restrictive placement for R.O. The juvenile court did not abuse its discretion in committing R.O. to the DJJ.

Sufficiency of Evidence to Sustain Finding M.L. Was an Aider and Abettor

M.L. maintains the court erred in denying his motion to dismiss the petition under Welfare and Institutions Code section 701.1 on the ground there was insufficient evidence he was an aider and abettor of the shooting. We review the denial of a section 701.1 motion under the substantial evidence standard. (*In re Andre G.* (1989) 210 Cal.App.3d 62, 65.)

" '[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.] Furthermore, under the ' "natural and probable consequences" ' doctrine, an aider and abettor is guilty not only of the offense he or she intended to facilitate or encourage, but also any reasonably foreseeable offense committed by the person he or she aids and abets." (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295–296.) The " ' "question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable." ' " (*People v. Favor* (2012) 54 Cal.4th 868, 874, italics omitted.) "As to intent, proof of an aider and

abettor's intent may be adduced 'by way of an inference from [his] volitional acts with knowledge of their probable consequences.' [Citation.]" (*People v. Mitchell* (1986) 183 Cal.App.3d 325, 330.)

The elements of aiding and abetting may be determined from a variety of factors, including presence at the scene of the crime, companionship, concerted wrongful action, conduct before and after the offense, and flight. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5; *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 78; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094–1095.) Although proof of only one of these factors, standing alone, may be insufficient to establish the defendant aided and abetted the commission of a charged offense (see *People v. Campbell* (1994) 25 Cal.App.4th 402, 409 [presence or failure to prevent crime insufficient]) in combination these factors can certainly constitute sufficient evidence to support such a finding. "[O]n appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment." (*People v. Mitchell*, *supra,*183 Cal.App.3d at p. 329.)

M.L. was R.O.'s uncle and shared a room with him. On the day of the shooting, the pair spent "pretty much that whole day" together. Earlier that day, the boys had encountered a group of boys in Sobrante Park who confronted them with knives and threatened to shoot them. After they went to the home of R.O.'s father, M.L. went with R.O. and a third boy to Catron Street. R.O., M.L. and the third boy were described as looking "like gangsters," and a neighbor who saw them approaching the van where children were playing went outside and yelled at them. R.O. nevertheless shot into the van. All three boys ran off, with M.L. and R.O. staying together. M.L. concedes he told police "he thought they were merely going to fight the boys in the van."

We conclude the juvenile court reasonably inferred—based on M.L.'s involvement in the earlier altercation in the park, going with R.O. to his father's home, arrival at the scene with R.O. and the third youth, continuing to approach the van even when yelled at by the neighbor, flight with R.O. after the shooting, and admitted intent to fight with the boys in the van—that M.L. aided, promoted, or encouraged the shooting.

In short, substantial evidence supports the court's finding that M.L. was guilty of the alleged offenses as an aider and abettor.

Failure to Declare M.L.'s Violation of Penal Code Section 246 a Felony or Misdemeanor

M.L. asserts Penal Code section 246, making it unlawful to willfully and maliciously discharge a firearm at an occupied motor vehicle, is a "wobbler" and his case must be remanded for the juvenile court to exercise its discretion to determine whether his conviction is a felony or a misdemeanor. The Attorney General has conceded "section 246 is a wobbler."

"The Legislature has classified most crimes as *either* a felony or a misdemeanor, by explicitly labeling the crime as such, or by the punishment prescribed. . . . There is, however, a special class of crimes involving conduct that varies widely in its level of seriousness. Such crimes, commonly referred to as 'wobbler[s]' [citation], are chargeable or, in the discretion of the court, punishable as either a felony or a misdemeanor; that is, they are punishable either by a term in state prison or by imprisonment in county jail and/or by a fine."[5] (*People v. Park* (2013) 56 Cal.4th 782, 789 (*Park*), italics omitted.)

If a "minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." (Welf. & Inst. Code, § 702.)

Section 17 defines felonies and misdemeanors: "A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions." (Pen. Code, § 17, subd. (a).) "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or

[5] "A recent amendment to section 17, subdivision (b), prompted by the Criminal Justice Realignment Act of 2011 (Stats. 2011, ch. 15, § 11), clarifies that 'imprisonment in the state prison' includes imprisonment in a county jail pursuant to section 1170, subdivision (h)(1), (2) . . . ." (*Park, supra,* 56 Cal. 4th at p. 789, fn. 4.)

imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor." (*Id.*, subd. (b)(2).)

Section 246 specifies: "Any person who shall maliciously and willfully discharge a firearm at an . . . occupied motor vehicle . . . is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, *or by imprisonment in the county jail for a term of not less than six months and not exceeding one year*." (§ 246, italics added.) Thus, the statute explicitly provides the option for punishment as a misdemeanor.

The Attorney General provided the following analysis of Assembly Bill No. 414, which added section 246, in a letter to then-Governor Earl Warren: "Section 17 of the Penal Code is over-riding and the grade of the crime is dependent solely on the punishment prescribed, hence violations of Section 246 would be either felonies or misdemeanors, dependent upon whether or not a state prison sentence was imposed." (Deputy Attorney General William J. Power, letter to Governor Earl Warren re: Assembly Bill. No. 414, June 10, 1949 at p. 1.) The Attorney General further stated, "[t]he characterization given a penalized act by the legislature is immaterial in determining whether or not it is a misdemeanor or a felony, the sole test being the nature and extent of the punishment imposed." (*Id.* at pp. 1–2, citing *People v. Trimble* (1936) 18 Cal.App.2d 350, 351; see also *People v. Rowland* (1937) 19 Cal.App.2d 540, 541–542.)[6]

The California Supreme Court has also noted section 246 is a " 'wobbler' offense[] that could result in either a felony or misdemeanor conviction." Section 246 is

[6] We take judicial notice of this legislative history on our own motion pursuant to Evidence Code sections 452, subdivisions (a) and (c), and 459, subdivisions (b)–(d), and have given notice to the parties to that effect.

"punishable as either a misdemeanor or a felony." (*People v. Sanders* (2012) 55 Cal.4th 731, 737 & fn. 5.)

We therefore agree section 246 is a "wobbler" and remand the matter to the juvenile court to exercise its discretion under Welfare and Institutions Code section 702 and declare whether M.L.'s violation of the statute is a felony or a misdemeanor.

The Gang Emblem Condition of M.L.'s Probation

M.L. also challenges the condition of his probation forbidding him from "wearing or displaying items or emblems reasonably known to be associated or symbolic of gang membership." He contends the condition is unconstitutionally vague.

"Under Welfare and Institutions Code section 730, subdivision (b) the juvenile court 'may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' 'A condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . ." ' [Citations.] All three factors must be present to invalidate a condition of probation." (*In re R.V.* (2009) 171 Cal.App.4th 239, 246.) " 'An appellate court will not disturb the juvenile court's broad discretion over probation conditions absent an abuse of discretion. [Citations.] We grant this broad discretion so that the juvenile court may serve its rehabilitative function and further the legislative policies of the juvenile court system.' " (*Ibid*.)

"A Court of Appeal will review the reasonableness of a probation condition only if the probationer has questioned it in the trial court." (*People v. Barajas* (2011) 198 Cal.App.4th 748, 753; see also *In re Abdirahman S.* (1997) 58 Cal.App.4th 963, 970 [forfeiture rule applies to juvenile defendants].) "In contrast, an appellate claim—amounting to a 'facial challenge'—that phrasing or language of a probation condition is unconstitutionally vague and overbroad because, for example, of the absence of a requirement of knowledge . . . does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal

concepts—a task that is well suited to the role of an appellate court. Consideration and possible modification of a challenged condition of probation, undertaken by the appellate court, may save the time and government resources that otherwise would be expended in attempting to enforce a condition that is invalid as a matter of law." (*In re Sheena K.* (2007) 40 Cal.4th 875, 885 (*Sheena K.*).) Thus, M.L.'s failure to object to the imposition of the gang condition in the juvenile court does not preclude his claim on appeal that the condition, as imposed, is unconstitutionally vague and overbroad.

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) An "explicit knowledge requirement is necessary to render [a gang] condition constitutional." (*Id.* at p. 892.) "Where a probation condition prohibits association with certain categories of persons, presence in certain types of areas, or possession of items that are not easily amenable to precise definition, 'an express knowledge requirement is reasonable and necessary.' " (*People v. Moore* (2012) 211 Cal.App.4th 1179, 1185.) "A knowledge requirement has also been extended to probation conditions restricting the display of gang signs and the possession of gang paraphernalia." (*People v. Kim* (2011) 193 Cal.App.4th 836, 844–845, [noting "it takes some experience or training to identify what colors, symbols, hand signs, slogans, and clothing are emblematic of various criminal street gangs"].)

Appellate courts have therefore modified "gang" probation conditions to include a knowledge requirement in order to pass constitutional muster. (See, e.g., *In re Vincent G.* (2008) 162 Cal.App.4th 238, 247–248 [probation condition modified directing the defendant "not to possess, wear or display any clothing or insignias, emblems, badges, or buttons *that you know, or that the probation officer informs you*, are evidence of affiliation or membership in a gang"];[7] *People v. Leon* (2010) 181 Cal.App.4th 943, 954.)

[7] The Attorney General cites *In re Vincent G.*, *supra*, 162 Cal.App.4th 238, to support the claim the "reasonably known" language of the gang condition is adequate. The court in that case, however, explained the issue was the minor's knowledge items

Appellate courts likewise have modified gang conditions to define "gang" by reference to Penal Code section 186.22, subdivisions (e) and (f). (*In re Vincent G.*, *supra*, 162 Cal.App.4th at p. 247.)

We therefore order the gang condition modified to read as follows: "You are not to possess, wear, display, or create by any means any insignia, emblem, button, badge, cap, hat, scarf, bandana or any other article of clothing, object or paraphernalia that you know, or a probation officer informs you, is evidence of affiliation with or membership in a gang; nor associate with anyone who you know, or a probation officer informs you, is affiliated with or a member of a gang. 'Gang' means a 'criminal street gang' as defined in Penal Code section 186.22, subdivisions (e) and (f)."

The Restitution Order Entered Against M.L.

M.B.'s mother sought restitution in the amount of $2,191.96 for medical expenses incurred due to M.B.'s gunshot injury. The juvenile court ordered restitution in the amount of $11,386.96. M.L. maintains no substantial evidence supports the differential in amount ($9,064) ordered by the court.

Welfare and Institutions Code section 730.6 provides in part: "It is the intent of the Legislature that a victim of conduct for which a minor is found to be a person described in Section 602 who incurs any economic loss as a result of the minor's conduct shall receive restitution directly from that minor." (Welf. & Inst. Code, § 730.6, subd. (a)(1).) We review the order of restitution for abuse of discretion. (*In re K.F.* (2009) 173 Cal.App.4th 655, 661.) " ' " 'When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.' " [Citations.]' [Citation.]" (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.)

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were evidence of gang affiliation, and modified the gang probation condition to read in relevant part: "You are not to possess, wear or display any clothing or insignias, emblems, badges, or buttons that *you know, or that the probation officer informs you*, are evidence of affiliation with or membership in a gang . . . ." (*Id*. at pp. 245, 247, italics added.)

"At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.] 'Once the victim has [i.e., the People have] made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim. [Citation.]' [Citation.]" (*People v. Millard*, *supra*, 175 Cal.App.4th at p. 26.) "None of the cases hold that the victim must supply a sworn proof of loss or detailed documentation of costs and expenses." (*In re S.S.* (1995) 37 Cal.App.4th 543, 547, fn. 2.) "There is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) The court need only "use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious." (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992.)

Victim restitution may include amounts billed for medical services provided by a health maintenance organization (HMO), "even when the victim is an HMO member not required to pay for those medical services." (*In re Eric S.* (2010) 183 Cal.App.4th 1560, 1562 (*Eric S.*).) "There is no great novelty in the notion that a person injured or damaged by the wrongful conduct of another may obtain full recovery from the wrongdoer even after partial or full reimbursement from an independent source. Indeed, in tort law, California adheres to the collateral source doctrine, which precludes the fact or amount of the victim's insurance recovery from reducing his recovery in tort. [Citation.] As we have explained in that setting, the tortfeasor should receive no windfall because the victim had the thrift and prescience to purchase insurance, and the investment represented by the victim's payment of insurance premiums would earn no benefit if they served to mitigate his tort damages. [Citation.] The victim obtains no double recovery to the extent his contractual arrangement with his insurer calls for subrogation or refund of insurance benefits in light of a recovery in tort." (*People v. Birkett* (1999) 21 Cal.4th 226, 247, fn. 19.)

The evidence submitted by the People in support of the restitution amount consisted of a restitution claim form submitted by the victim's mother, a memorandum to the court from deputy probation officer Roslyn R. Bordelon, a copy of an ambulance bill from American Medical Response, a copy of a bill from Alameda County Medical Center, and a copy of a receipt from Kaiser. M.B.'s mother requested restitution of $2,311.96, consisting of $2,191.96 for the ambulance, $35 for Highland Hospital, $45 for three visits to Kaiser, and $40 for an arm brace.

The Alameda County Medical Center (Highland Hospital) bill submitted indicates total charges of $9,199. It also indicates three payments made on the account, totaling $9,164, with the notation "K11 K11 Kaiser," and indicates "your insurance company has paid its portion. The balance is now due from you." The "Account Balance" on the bill is $35.

A number of courts have considered the issue of restitution for medical expenses incurred by a victim who was a member of Kaiser. In *In re K.F.*, *supra*, 173 Cal.App.4th 655, the victim was treated at a Kaiser Hospital. (*Id.* at pp. 662–663.) Two documents were in evidence; one a "Consolidated Statement of Benefits" indicating "Total Billed Charges" and "Total Benefits Provided" of $17, 261.53 with " 'Amount Received $0.00'; and 'Balance Due $17, 261.53' "; the other an "Explanation of Benefits" from Kaiser listing $582.32 as "Ambulance Charges." (*Id.* at pp. 663–664.) The explanation of benefits stated " '[t]his is not a bill' " and indicate $0 was owed under the heading "Your Obligation." (*Id.* at p. 664.) The court concluded there was sufficient evidence the victim was billed for $17,261.53, but not that he incurred a loss of $582.32 for the ambulance services. (*Id.* at pp. 663–664.)

In *People v. Duong* (2010) 180 Cal.App.4th 1533, the victim was also a Kaiser member. (*Id.* at p. 1536.) Kaiser had retained an entity called "Healthcare Recoveries," " 'to act as its agent in the assertion of its rights of subrogation and/or reimbursement for medical services.' " (*Ibid.*) The company provided a "Consolidated Statement of Benefits" stating the "Total Billed Charges" and the "Total Benefits Provided" were $4,459.00, and that the entire amount was "due and unpaid." (*Ibid.*) By letter, the

company indicated "the statement of benefits 'may contain capitated charges,' and that 'At settlement, Kaiser will accept a 20% reduction on all capitated charges . . . . With the 20% reduction for capitated charges, the lien amount associated with the attached Consolidated Statement of Benefits is $1538.20.' " (*Ibid*.) The court first explained that even though the victim "was not obligated to pay any amount above her membership fees in the health plan for the services she received, charges were incurred on her behalf as a result of defendant's criminal conduct." (*Id*. at p. 1539.) Thus, "the court is required to order the defendant to pay restitution for those charges." (*Ibid*.) The court held, however, that restitution was only required "in the amount that the record shows Kaiser will accept as full payment for the services," not in the full amount billed by Kaiser. (*Ibid*; see also *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 567–568 [actual losses due to personal injury are no more than what providers accept for payment for services and do not include amounts providers "write off"].)

Eric S., supra, 183 Cal.App.4th 1560, also involved restitution for a Kaiser member, and Kaiser again utilized "Healthcare Recoveries," which submitted a "Consolidated Statement of Benefits" indicating Kaiser would accept a " '20% reduction on all capitated charges.' " (*Id*. at p. 1563.) The defendant contended "direct restitution is limited to economic losses actually incurred by the victim and should not include medical expenses the victim is not obligated to pay for personally." (*Id*. at pp. 1563–1564.) The court held "[t]he fortuity that the victim had purchased membership in an HMO, like the fortuity that a victim has purchased third party insurance [citation], or the fortuity that a victim is covered by Medicare/Medi–Cal [citation], should not shield appellant from paying restitution for the medical expenses in this case." (*Id.* at p. 1565.)

M.L. claims this case "is factually different than the restitution ordered for Kaiser services" in these cases, because the victim "was treated at a non-Kaiser medical center, but insured by Kaiser" and there was no "Consolidated Statement of Benefits" in evidence. These are immaterial distinctions. The record reflects the victim received a bill from Alameda County Medical Center indicating total charges of $9,199 for the victim's treatment. That bill indicated three debits from that amount of $9,074, $9.67 and

$80.33, all with the notation "K11 K11 Kaiser." The bill also indicated "[y]our insurance company has paid its portion. The balance [of $35] is now due from you." Thus, the evidence before the juvenile court indicated the insurer (Kaiser) *paid* $9,199 for the $9,224 of billed medical services. There is nothing suggesting Alameda County Medical Center accepted a lesser amount in satisfaction of its bill.

The restitution order is therefore supported by substantial evidence.

DISPOSITION

The gang condition imposed on M.L.'s probation is modified to read: "You are not to possess, wear, display, or create by any means any insignia, emblem, button, badge, cap, hat, scarf, bandana or any other article of clothing, object or paraphernalia that you know, or a probation officer informs you, is evidence of affiliation with or membership in a gang; nor associate with anyone who you know, or a probation officer informs you, is affiliated with or a member of a gang. 'Gang' means a 'criminal street gang' as defined in Penal Code section 186.22, subdivisions (e) and (f)." In addition, as to M.L., the matter is remanded for the juvenile court to declare whether his violation of section 246 is a felony or misdemeanor. As modified, and in all other respects, the findings and dispositional orders of the juvenile court are affirmed.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.